PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

07 - 4 0 4 SEP 2 0 2007

OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

AIRMAN BASIC ASHONTIA K. HARROW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

David P. Sheldon, Esq.
Barracks Row
512 8TH Street, SE
Washington, DC 20003
(202) 546-9575

September 20, 2007

Attorney for Petitioner

QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces erred in finding harmless error despite determining that the trial court made three, erroneous, critical rulings—namely:

(1) that the trial judge erred by preventing the defense from impeaching the testimony of the deceased baby's father (the only other person present during the alleged shaking incident) with prior inconsistent statements regarding the baby's interactions with Appellant and regarding the baby's cries after Appellant left the house;

(2) the military judge erred by denying a defense motion in limine to exclude the testimony of various witnesses regarding Appellant's pattern of minor parental abuse where the testimony constituted inappropriate character evidence that was unfairly prejudicial.

(3) the military judge erred by allowing the prosecution's expert witness to present inadmissible profile evidence that placed Appellant in the profiled category and excluded the deceased baby's father—the only other suspect—from the profiled category.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 12

APPENDIX A
Opinion of the United States Court of Appeals for the Armed Forces (2007) 1a

APPENDIX B
Opinion of the United States Air Force Court of Criminal Appeals (2006) 37a

TABLE OF AUTHORITIES

Constitutional Provisions

5th Amendment ..... *passim*

6th Amendment. ..... *passim*

Decisions of the Supreme Court of the United States

Ake v. Oklahoma, 470 U.S. 68 (1985) 7

Chambers v. Mississippi, 410 U.S. 284 (1973). 7

Crawford v. Washington, 541 U.S. (2004) 7

Davis v. Alaska, 415 U.S. 308 (1974) 7

Douglas v. Alabama, 380 U.S. 415 (1965) 7

Holmes v. South Carolina, 547 U.S. 319 (2006) 7

Kotteakos v. United States, 328 U.S. 750 (1946) 11

United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) . 7

Webb v. Texas, 409 U.S. 95 (1972) 7

Circuit Court Cases

United States v. Harrow, 62 M.J. 649 (A.F. Ct. Crim. App. 2006) 1, 2

United States v. Harrow, 65 M.J. 190 (C.A.A.F. 2007) ... 1

United States v. Rogers, 89 F.3d 1326 (7th Cir. 1996) 11

United States v. Santos, 201 F.3d 953 (7th Cir. 2000) 11

Federal Statutes

10 U.S.C. § 810 ..... *passim*
10 U.S.C. § 867a 1
10 U.S.C. § 886 2
10 U.S.C. § 907 2
10 U.S.C. § 918 2
10 U.S.C. § 921 2
10 U.S.C. § 934 2
28 U.S.C. § 1259 1

Uniform Code of Military Justice

Article 86 2
Article 107 2
Article 118 2
Article 121 2
Article 134 2

The petitioner, Airman Basic Ashontia K. Harrow, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in her case on June 22, 2007.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007), is located at Appendix A. The published opinion of the United States Air Force Court of Criminal Appeals, *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on June 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states in relevant parts:

> No person shall be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment of the United States Constitution guarantees the right of an accused to confront the witnesses against him.

STATEMENT OF THE CASE

A general court-martial composed of officer and enlisted members convicted Airman Harrow, contrary to her plea, of the unpremeditated murder of her infant daughter, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918 (2000). Airman Harrow pled guilty to violations of Articles 86, 107, 121 and 134, UCMJ, 10 U.S.C. §§ 886, 907, 921, 934 (2000), and thirteen specifications thereunder, to include: multiple failures to go, absence without leave, making a false official statement, theft of insurance proceeds, fraud in obtaining phone services, dishonorable failure to pay just debts, and making false claims to secure the approval of a loan. The sentence adjudged by the court-martial and approved by the convening authority included a dishonorable discharge, confinement for twenty-five years, and forfeiture of all pay and allowances.

The Court of Criminal Appeals affirmed all charges except one specification of absence without leave. *United States v. Harrow*, 62 M.J. 649, 661-62 (A.F. Ct. Crim. App. 2006). The Court of Criminal Appeals found that Appellant's plea of guilty to the absence without leave charge was improvident and reassessed her sentence to a dishonorable discharge, twenty-four years and six months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E1.

1. The Facts Presented at Trial

Destiny Harrow, the daughter of Airman Harrow, died on November 29, 2000. P.E. 2. An autopsy attributed her death to "shaken baby syndrome." There were no eyewitnesses to the alleged offense and Destiny was at home alone with Antonio Jackson, who was Appellant's boyfriend and Destiny's father, immediately preceding her seizure. The

defense's theory at trial was that Jackson committed the offense.

The key government testimony came from Jackson. On June 22, 2000—the day before the alleged shaking—Jackson claimed Destiny had been "sick." R. 343. He had been with Destiny all that day. On June 23, 2000, Jackson was again left alone with Destiny while Airman Harrow went to work. R. 344. Jackson claimed that he was in the bathroom and Destiny was on the couch when Airman Harrow came home and lay down on the couch to watch television. R. 346-47. At some point, Airman Harrow and Jackson got into an argument. According to Jackson, he was shaving when Appellant "came into the bathroom fussing, just mad" and "arguing with me, screaming." R. 348. Jackson did admit he was also "mad." R. 407.

Responding to leading questions on direct examination, Jackson claimed that Airman Harrow then grabbed Destiny from the couch by one arm. R. 350. She pointed a broom at him, threw objects, and threw Destiny's walker. R. 351. He maintained that Airman Harrow walked around and held Destiny by one arm with "her body just kind of wiggling and jerking around." R. 354. Yet there was no evidence of joint dislocations on her body. R. 329. At that point, Jackson averred that he locked himself in the bathroom while Airman Harrow yelled and screamed and threw objects against the walls. R. 353. Nina Harris, the neighbor, stated that during the argument she heard Destiny crying loudly. R. 458-60. A "bang against [Nina's] wall" knocked a picture down and Destiny's crying stopped. Id. Nina claimed to have heard Destiny "whimper twice and that was it." Id. This was purportedly only five minutes before Appellant left the house "angry" and "raged." R. 461.

Neither Nina's nor Jackson's accounts squared with that of SrA Jason Warren, a Security Forces member who was dispatched at approximately 1445 to contact Airman Harrow because her first sergeant needed her to call work. He arrived at the residence at 1450—in the "thick" of the alleged argument and Appellant's "throwing" fit. When he arrived, he did not hear any yelling, radio, or objects being thrown. R. 448, 450. Airman Harrow answered the door holding Destiny in her left arm on her hip. R. 443-45. According to SrA Warren, Destiny was responsive, made eye contact, and was not bruised in any way. R. 449. Airman Harrow did not appear angry, flushed, or excited and there was no sign that a struggle had occurred in the house. R. 449-50.

In Jackson's account, after watching Airman Harrow leave in her car, he got a bottle for Destiny from her room. R. 356. He laid the bottle in Destiny's hand but she was unresponsive. R. 357. He then went into the bathroom to finish shaving. Id. He could hear Destiny making a gargling sound and he saw vomit hanging from her mouth. R. 358. He picked her up, turned her over, and "hit her a couple times" lightly to get out the vomit. R. 359. Then she started shaking, he could see the whites of her eyes, and her body went limp. R. 360. He then "ran next door" with Destiny to the Harris's for help. R. 361. Nina dialed 911 and an ambulance arrived and took Destiny to the hospital.

While Jackson was cooperative during direct examination, his demeanor changed on cross. He refused to answer basic questions even after having his memory refreshed, forgetting details that could be harmful to him. He did not remember saying that Destiny was laying on the couch crying when he came out of the bathroom after Appellant left. R. 380. However, the agent notes indicated that he told the FBI that he "heard Destiny crying" and "came out of the bathroom 30

seconds later." App. Ex. LV, p. 2. He also told the FBI a second time that when he came out of the bathroom Destiny was crying and that she only stopped after he gave her the bottle. *Id.* at p. 5. Further, in a written statement to OSI dated August 15, 2000, Jackson stated, "Destiny was on the sofa crying so I gave her her bottle and preceded [sic] to the bathroom. A few seconds later I heard a choking and gagging noise . . . ." Vol. 3, Second Art. 32 Investigation, IO Ex. 39, p. 3.

After cross-examination, the court reporter's recording apparatus broke down, leaving a gap from 1420 to 1653 in the record—missing up to 20 minutes of the proceedings. The parties attempted to re-enact the testimony; however, Jackson's actual responses were forever lost.

2. The Erroneous Rulings of the Trial Court

a. Jackson's inconsistent statements

At trial, Appellant argued for admission of extrinsic evidence of two primary inconsistencies in Jackson's testimony: (1) whether Destiny was crying after Appellant left the residence, and (2) Jackson's differing descriptions of Appellant's interaction with Destiny on the day Destiny was injured. The defense argued at trial and again on appeal, that Jackson's in-court testimony on direct-examination was inconsistent with his prior out of court statements.

b. The admission of "bad parent" character evidence

Over defense objection, the military judge allowed the prosecution to present purported "pattern of abuse" evidence regarding Appellant's interactions with Destiny in the months prior to the alleged shaking. This impermissible "bad parent"

character evidence was admitted to demonstrate that Appellant had a violent intent in the past and that it was therefore more probable that she would have a violent intent on the day of the shaking. However, her intent was not at issue. The issue was whether the event happened at all.

c. The Admission of Erroneous Profile Evidence

Over defense objection, the military judge allowed the prosecution to present profile evidence during the testimony of Dr. Cooper, the government expert. Dr. Cooper's testimony was not designed to educate members in understanding the evidence but to exclude Antonio Jackson as a suspect and prove Appellant was the person who shook Destiny. Dr. Cooper set specific parameters on how and when the abuse occurred that excluded Jackson as a viable suspect and pointed to Appellant as the perpetrator. Trial counsel's argument on the merits used these profiles with devastating and unfair impact on Appellant's case.

3. The Ruling of the Court of Appeals.

The Court of Appeals for the Armed Forces found that the trial court erroneously prevented the defense from questioning Antonio Jackson, the only other person who had custody of Destiny in the hours before she was injured, regarding inconsistent statements he had made. Likewise, the Court found that the admission of "bad parent" character evidence was "tenuous at best."

Finally, the Court below found that the trial court impermissibly allowed into evidence profile evidence that implicated Airman Harrow. Notwithstanding these critical rulings, the Court of Appeals upheld the conviction, finding the errors to be harmless.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Armed Forces conflicts with this Court's rulings. This writ should be granted under Rule 10 of this Court's rules.

It is axiomatic that Airman Harrow, like all citizens, has the right under the Sixth Amendment of the Constitution to confront the witnesses against her. This right is primarily secured through the right of cross examination. *Crawford v. Washington*, 541 U.S. (2004); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). In cross-examining a witness, an accused is specifically permitted to confront, impeach, or discredit the government's witnesses. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

Of course, a defendant has the right to present legally and logically relevant evidence at trial. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Chambers v. Mississippi*, 410 U.S. 284 (1973). The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental constitutional right. *Holmes v. South Carolina*, 547 U.S. 319 (2006); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Chambers v. Mississippi*, *supra*; *Webb v. Texas*, 409 U.S. 95 (1972). When the defense is prohibited from doing so, the error must be found to be harmless beyond a reasonable doubt.

Here, the defense should have been permitted to present extrinsic evidence that Jackson had previously stated on numerous occasions that Destiny was crying after Appellant left the house. Jackson's position on direct examination at trial contradicted his earlier statements to investigators on this point. On direct, he testified that after Appellant left the residence, Destiny was not alert and lying motionless on the

couch. R. 356-57. He also testified, on redirect, that the child was quiet on the couch following Appellant's departure. R. 429.

During the re-enactment of Jackson's testimony after the court reporter's recording equipment malfunctioned, even trial counsel recalled a similar statement by the witness, stating, "I remember Jackson saying that it didn't surprise him that the baby was quiet lying on the couch because he knew that she hadn't been feeling her normal self and wasn't feeling well, so it didn't surprise him that the baby was quiet." R. 430. Since there is no verbatim record of trial of this testimony, it is unclear whether he addressed the "crying v. quiet" question in more detail.

Jackson, however, had made prior inconsistent statements to the FBI and OSI regarding whether Destiny was crying after Appellant left. The agent notes reflect that Jackson told the FBI that he "heard Destiny crying" and "came out of the bathroom 30 seconds later." 1 App. Ex. LV, p. 2. He also told the FBI a second time that when he came out of the bathroom Destiny was crying and that she stopped crying after he gave her a bottle. Id. at p. 5. In a written statement to SA Davenport at OSI, dated August 15, 2000, Jackson stated, "Destiny was on the sofa crying so I gave her her bottle and preceded [sic] to the bathroom. A few seconds later I heard a choking and gagging . . . ." Vol. 3, Second Art. 32, IO Ex. 39, p. 3.

The defense sought to call SA Davenport to testify that in a previous interview Jackson stated that after Appellant left, he heard Destiny crying as though she missed her mother. Also, in a written statement, Jackson wrote that after Appellant left, Destiny was crying so he gave her a bottle. App. Ex. LV.

Despite these inconsistencies, the military judge refused to allow the defense to recall SA Davenport to testify about them. The basis for the judge's decision was a misunderstanding of the law regarding impeachment by prior inconsistent statements. The judge seemed to believe that a statement was not inconsistent if a witness did not recall giving the statement. This notion originated with trial counsel during her initial objection:

> TC: And I think a court member even asked that question again and he simply said, "I don't recall. I don't remember." That was my recollection of his testimony. [Note: This referred to testimony that was not recorded due to the equipment malfunction.]
>
> MJ: And that would be my recollection also.
>
> ATC1: And, so, my understanding is that they would want to go into that with Ms. Davenport as a prior inconsistent statement. And, of course, that would not be inconsistent if he had said it previously in an interview and then on the stand said, "I don't remember."
>
> MJ: Sure. And I would agree with that analysis.

R. 849 (notation added). Trial defense counsel disagreed and explained what testimony he recalled to support the admission of a prior inconsistent statement. Specifically, he argued that on the witness stand Jackson had described the scene with Destiny lying unalert on the couch and that he had left out any reference to her crying. *Id.* The military judge, relying on his own recollection, replied:

[M]y recollection was when that was inquired into, I think that he said he didn't remember when he was asked about crying. That's my recollection of it. And if he said, "I don't remember" as opposed to "No I didn't" then you don't have an inconsistent statement. It's only when he denies the statement was made.

R. 849-50 (emphasis added). Trial defense counsel persisted, explaining that both on direct and cross-examination the witness had described Destiny at that time as "limp and non-responsive." R. 850. The defense proffered that SA Davenport would testify that Jackson had told OSI that Destiny was "crying as if she missed her mother because she had just left" after Appellant left the house. *Id.*

The military judge refused to accept the defense proffer, stating that "[a]ccording to my notes . . . I don't see anything in here in which [Jackson] denied that she was crying." *Id.* Despite further persistence by the defense, the military judge ruled: "Counsel, according to my notes, it was non-responsive as far as denying that. So for that particular aspect of that one question, I would not allow that, based on my notes. I simply don't have it in there." R. 851.

The military judge and trial counsel were apparently confusing another concept related to prior inconsistent statements. Under the rule, if a witness admits to making the inconsistent statement, extrinsic evidence of that statement is generally not permitted. However, if a witness denies making the statement—or cannot remember whether or not he made it—then extrinsic evidence can be used.

It is Jackson's answers to trial counsel, on direct-examination and redirect (from what can be discerned from the reconstructed redirect testimony), which constitute statements

inconsistent with his prior out of court statements to investigators. This is what trial defense counsel argued at trial.

See R. 849. His later response on cross-examination that he did not remember making the prior inconsistent statement, was an equivocation, at best, and far from an acknowledgment of the prior statement.

The Court of Appeals for the Armed Forces found the judge's prohibition against the defense to be error, but applied a non-constitutional harmless error analysis under *Kotteakos v. United States*, 328 U.S. 750 (1946).

The Court of Appeals for the Armed Forces also found that the trial judge improperly and erroneously allowed the members to consider `bad parent' character evidence and improper profile evidence. Yet the lower court dismissed these clear evidentiary errors because the "minor acts" admitted and the improper profile evidence were harmless. In doing so, the lower court totally ignored the cumulative effect that such multiple errors caused.

As Chief Judge Posner has written for the Seventh Circuit, "[I]n assessing whether a conviction should be upheld despite the presence of error, a court is required to assess the harm done by the errors considered in the aggregate." *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000). Indeed, "the cumulative effect of trial errors may deprive a defendant of his constitutional right to a fair trial." *Id.* (quoting *United States v. Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996)).

In its decision below, the United States Court of Appeals for the Armed Forces incorrectly concluded that even though Petitioner could not confront the witness for the government–the only other suspect in the death of her

daughter–that such error was harmless. The Court also erroneously concluded that the erroneous evidentiary rulings in their aggregate was not harmless. In so ruling, the Court applied the incorrect analysis in that the Court did not determine that the error was harmless beyond a reasonable doubt. Because of this, the Court should grant the writ and set the case down for plenary briefing and oral argument.

CONCLUSION

Petitioner's right under the Sixth Amendment to confront the witnesses against her was violated. Her right to a fair trial was undermined by not only the trial judge's ruling on this issue but also on the two other evidentiary rulings the Court below also found to be in error. The Court of Appeals's decision is infirm. This Court should grant review under Rule 10 because the lowers court's decision directly conflicts with this Court's rulings. The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

David P. Sheldon, Esq.
Barracks Row
512 8th Street, SE
Washington, DC 20003
(202) 546-9575

September 20, 2007

Attorney for Petitioner